

handout

UNIFORM PROBATE CODE (UPC)

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The UPC is one of 150 acts, drafted by the Uniform Law Commission (ULC), which has been adopted in Montana. The ULC is a non-profit, non-partisan, unincorporated association, comprised of state commissions on uniform laws from each state who volunteer their time for one purpose—to study and review the law of the states in order to recommend which areas of law should be uniform. Uniform laws facilitate the ability of individuals and businesses to deal with different laws, as they move and do business in different states.

The ULC first promulgated the Uniform Probate Code in 1969. In 1974, Montana adopted the UPC. Since then, the ULC has promulgated many additions and modifications to the UPC. Montana's most-recent comprehensive update of the Montana UPC occurred in 1993. Since then, the ULC completed a wholesale review of the Uniform Probate Code, and promulgated significant additional amendments. To date, Montana has not considered those amendments.

In 2017, the Business, Estates, Trusts, Tax, and Real Property Section (also known as the "BETTR" Section) of the State Bar of Montana undertook a side-by-side analysis of Chapters 1, 2, 3, 4, and 6 of the current Montana UPC and law and the corresponding provisions of the current UPC as amended. A committee of the BETTR Section is studying this analysis and should soon complete its study and recommend many of the latest amendments to the UPC.

The large majority of provisions in the current Uniform Law Commission's version of the Uniform Probate Code are similar, or even identical to, Montana's current law.

Some amendments deal with inflation.

- The Homestead Allowance is increased to \$22,500.
- The family allowance cap is increased from \$20,000 to \$27,500.
- Exempt Property is increased to \$15,000.
- A beneficiary of an estate must have an interest in the estate valued at \$5,000 or more in order to demand the Personal Representative be bonded.
- A personal representative could distribute assets not exceeding \$50,000 in value to a person under a disability.

Major Substantive Changes Include:

One. Elective Share. The Elective Share provisions protect the surviving spouse from disinheritance. Under a partnership theory of marriage, a surviving spouse (wife or husband) in a long-term marriage (15 or more years) is entitled to at least 50% of the parties' assets.

The new law would clarify some matters. For example, under existing Montana law, the parties can enter into a premarital agreement and agree to accept less than the full amount of the elective share. However, current Montana law is silent on whether the parties can enter into an effective agreement after marriage. The new UPC expressly authorizes post-nuptial agreements. In order to be enforceable, such agreements must be voluntary, must not be the result of duress, and the surviving must have access to independent legal representation and must have adequate financial disclosure.

Under current Montana law, life insurance payable to someone other than the surviving spouse is not considered a marital asset.

Example. A husband and wife have been married for 15 or more years. Husband dies. His sole asset is a life insurance policy with a \$5 million death benefit. As owner of the policy, husband had designated his girlfriend as the policy beneficiary. The wife owns no assets other than household effects and clothing. Under existing Montana law, this life insurance is not counted. As a result, the surviving wife receives nothing under current Montana law and the girlfriend receives the full \$5 million death benefit from the insurance company.

In other words, existing Montana law permits a decedent spouse to entirely disinherit his surviving spouse and circumvent the Elective Share protections.

Under the new UPC provisions, proceeds of insurance, including accidental death benefits on the life of the decedent, if the decedent owned the insurance policy immediately before death, are counted as marital assets. As a result, the surviving wife in the above example would receive \$2.5 million of the death benefit and the girlfriend would receive the remaining \$2.5 million.

Two. Inheritance from a deceased child. If an unmarried child who has no children dies without a will, the child's parents would inherit under existing Montana law. The new law does not modify this general rule. However, the new law provides that if a parent's parental rights had been terminated, that parent would not inherit.

Three. Disclaimers. A beneficiary does not have to accept a distribution from an estate and can file what is known as a "disclaimer." Montana currently has one section of the UPC that deals with disclaimers. The new UPC includes more complete statutes dealing with the matter.

Four. Beneficiary Deeds. Montana law permits a person who owns real estate to file a deed that names a beneficiary to receive the property after owner's death. The new UPC includes more complete statutes covering this matter.

Five. Reformation to Correct Mistakes. Courts have been reluctant to correct mistakes in wills. The courts are legitimately concerned that correcting mistakes would open the floodgates of litigation which could dissipate the decedent's assets. This reluctance is most profound when the mistake is that of omission, that is, the will omitted a beneficiary and the would-be beneficiary seeks a distribution after the decedent's death.

The most recent UPC would allow courts to reform the terms of a will, even if unambiguous, if clear and convincing evidence establishes doing so is necessary to implement the testator's intention. The BETTR committee has not yet considered this proposed change in the UPC. Although one can see its benefit in the above example, one can also imagine another circumstance where a bad actor could allege that she was excluded from a will, bring an action under the grounds of "mistake," and cost the estate and the lawful beneficiaries' money to defend against the claim. In short, there are competing concerns.

Six. Assisted Reproduction. Another matter that the BETTR committee has not fully considered concerns new statutory provisions for dealing with assisted reproduction, third-party egg and sperm donors, gestational carriers, and posthumously-conceived children. Most of these concerns deal with the right to inherit under intestacy, that is, dying without a will. Currently, Montana statutory law is devoid of any guidance on how these matters should be resolved.